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In The

Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., *Appellant,*

v.

FEDERAL ELECTION COMMISSION, ET AL., *Appellees.*

On Appeal from the United States District Court
for the District of Columbia

Brief Opposing Appellee's Motion to Dismiss or Affirm And Intervenor-Appellees' Motion to Affirm

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Corporate Disclosure Statement

The Christian Civic League of Maine, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument[1]

The district court erred in dismissing the Christian Civic League's claims as to the Crossroads Ad as moot because it is not capable of repetition yet evading review. The court found that this controversy, a classic example of a situation meriting the exception, was neither capable of repetition nor would a recurrence "necessarily" evade review. In doing so, the lower court severely distorts the requirements for the exception, leading another three-judge court in the district, "confronted with essentially the same issue," to "respectfully disagree" with the holding on appeal here. *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260, 2006 WL 3746669, at *4 (D. D.C. Dec. 21, 2006) ("*WRTL II*").

Any future challenge to the electioneering communication prohibition will be as applied. By defining an as-applied challenge as limited to all of its particular facts for purposes of the capable of repetition prong of the exception to mootness, the court has effectively ruled that the constitutionality of applying the electioneering communication prohibition to grassroots lobbying is never capable of repetition.

The scenario the court proposed as satisfactorily ensuring complete judicial review of the controversy is "unreasonable, if not fanciful." *WRTL II*, No. 04-1260, 2006 WL 3746669, at *4. The court ruled that the legal question presented will not escape full judicial review, despite the experience here and in *Wisconsin Right to Life, Inc. v. FEC*, and findings by the district court in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D. D.C. 2003), supporting the commonsense conclusion that the question will likely *only* arise when it cannot be fully reviewed.

The lower court's analysis departs from well-established standards, and if consistently applied to the controversy this

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[1]The FEC and Intervenors filed separate responses to the League's Jurisdictional Statement. Since the relevant arguments presented in each motion are largely the same, the League responds to both Motions in this Opposition.

case presents, the important legal question of the constitutionality of applying the electioneering communication prohibition to grassroots lobbying could never be fully reviewed. This Court should correct the lower court's error and resolve the question the League's suit presents.

I. The Holding Below Precludes Full Review of the Legal Question This Case Presents.

The FEC argued in *McConnell v. FEC*, 540 U.S. 93 (2003), that as-applied challenges could be considered later and the Court in *McConnell* should simply consider the facial challenge. Then in *Wisconsin Right to Life, Inc. v. FEC*, 126 S. Ct. 1016 (2006) ("*WRTL I*"), the FEC and Intervenors insisted that as-applied challenges were precluded by *McConnell*. In oral argument, the Chief Justice described this as a bait and switch. Transcript of Oral Argument at 22, *WRTL v. FEC*, 126 S. Ct. 1017 (No. 04-1581). Just as Defendants argued in *WRTL I*, that this Court's decision in *McConnell* precluded all as-applied challenges to the electioneering communication prohibition, The FEC and Intervenors argued here that *McConnell* precludes all preliminary injunctions in as-applied challenges to the prohibition. The district court denied CCL preliminary injunctive relief; this Court found that denial moot. *Christian Civic League of Maine, Inc. v. FEC*, 127 S.Ct. 336 (2006). The district court has now dismissed as moot the question of the constitutionality of the electioneering communication prohibition with respect to the League's Crossroads Ad and ruled that the question of its application is not ripe with respect to any future ads. If tolerated, this last maneuver puts citizen groups in an endless loop of being mooted but never ripe in their efforts to obtain this Court's constitutional judgment on this important public issue.

This situation epitomizes the purpose of the exception to mootness. The exception provides the time courts need to consider the merits of a challenge to the constitutionality of a

statute's application when, as here, it is election-related and the situation will, by its very nature, quickly become moot. Resolving the particular legal question presented then simplifies future challenges, making adjudication on the eve of election simpler or even unnecessary. "The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Storer v. Brown*, 415 U.S. 724, 738 n.8 (1974).

Under the lower court's holding, the only apparent way for a court to hear an as-applied challenge to the electioneering communication prohibition is to require a plaintiff to rack up a string of failed preliminary injunction attempts to unequivocally establish that the controversy is indeed capable of repetition and then to file suit far enough in advance that the ruling can be reached before the suit becomes moot. The first requirement offends the First Amendment, the second is untenable.

II. The Mootness Exception Applies Here.

A. The controversy here is a classic example of a situation justifying the well-established exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." In *WRTL II*, the three-judge court noted that "no less than ten federal court decisions involving election-related challenges in which this exception was applied well establishes this point." 2006 WL 3746669, at *3. *See also id.* (noting Intervenors' "grudging[] characteriz[ation] [of] the application of this exception as a 'close question' notwithstanding our Circuit Court's holding in *Branch v. FCC*, 824 F.2d 37, 41 n. 2 (D.C.Cir.1987)"). As the court in *WRTL II* correctly observed, "[p]laintiff's factual predicament is not novel. Indeed, it is a classic example of the well-established exception to the mootness doctrine for cases that are 'capable of repetition, yet evading review.'" 2006 WL 3746669, at *3. This Court found

unremarkable the exception's application to the same issue when it heard Wisconsin Right to Life's first appeal. *See* App. 13 n.14 (noting that the question of the mootness exception was squarely before this Court there). The weight of applicable authority holding that election-related disputes are archetypical situations qualifying for the exception justifies presumption of its application here. *Cf.* FEC Mot. Dismiss or Aff. at 22.

B. As-applied challenges do not constitute a perfect storm that must be capable of repetition to escape mootness. The district court anchors its unprecedented standard to the fact that this is an as-applied challenge. The court conceded that as-applied challenges to a statute "*may* be 'capable of repetition' for purposes of the [mootness] exception," but then reads into "as-applied" a "perfect storm" of conditions so specific as to make the legal questions the League's suit presents incapable of repetition. App. 12a.[2]

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[2]In support of its "precise" standard for as-applied challenges, the lower court cites *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 422-23 (D.C. Cir. 2005) ("*PETA*"). The controversy at issue in *PETA* was not election-related, so it says nothing about election-related suits. Nor does the *PETA* court's analysis support the conclusion that a "perfect storm" of factual circumstances must be repeatable for as-applied challenges to survive mootness. The *PETA* court observed that, as the lower court recited, what must be shown as likely to be repeated "must be defined in terms of the precise controversy it spawns." *Id.* at 422. First, this familiar proposition, by itself, hardly justifies the conclusion that here, at least seven purely factual circumstances must be shown to be reasonably expected to recur. Moreover, *PETA*'s holding is that what must be shown to be capable of repetition to save a claim from mootness is based on the facts *as they relate to the legal questions the complaint raises. Id.* at 423 ("the alleged 'wrong' [must be] put in terms of the legal questions it presents for decision."). So what must be capable of repetition is a) what the plaintiff wanted to do, and b) the purportedly unconstitutional action taken by the government, including constitutionally permissible reasons for the action. This reflects the constitutional analysis required to resolve the controversy.

The *PETA* court looked to the complaint to discover the nature of the

If this analysis is correct (that as-applied challenges are unique and incapable of repetition), the question of the constitutionality of the electioneering communication prohibition as applied to grassroots lobbying will never be adjudicated on its merits because all challenges to the electioneering communication prohibition will be as-applied. The lower court's analysis of the exception to mootness to as-applied challenges is unprecedented.

If correct, it would follow that some prior cases were wrongly heard. One example would be *Storer,* where an as-applied election law controversy was found capable of repetition, perhaps with different *plaintiffs*. "[T]he issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections."

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legal question presented, 396 F.3d at 423, and found that PETA's claim was not capable of repetition because "the legal questions it presents for decision," as defined above, were that its proffered expression was wrongly rejected for display because it satisfied the requirements for acceptance as published and applied. *Id.* at 422-23. Accordingly, the controversy was "highly fact specific" because "PETA thinks the decision turns on . . . what design criteria . . . the Commission actually employed, whether PETA's [sponsorship] put it on a different track than [the other] artists, and whether . . . the rejection of PETA's designs constituted content or viewpoint discrimination . . . ." *Id.* at 423.

Here, the League claims that applying the electioneering communication prohibition to the Crossroads Ad is unconstitutional because it is not narrowly tailored to a compelling government interest. Resolving the legal issue presented requires that a court determine whether the electioneering communication prohibition can be constitutionally applied to grassroots lobbying ads such as the Crossroads Ads. In short, the question is whether ads such as the Crossroads ad are the functional equivalent of express advocacy. What the League must show a reasonable expectation of recurring is what it has alleged in its Complaint: that the electioneering communication prohibition can reasonably be expected to be applied to an ad like the Crossroads Ad. The circumstances urged as unrepeatable by the FEC and Intervenors and the court below are not relevant to the legal issue presented, and it is error to require the League to show that they will recur.

415 U.S. at 738 n.8.[3] *See also Pearlman v. Vigil-Giron*, 71 Fed. Appx. 11 (10th Cir.2003) (as-applied challenge was not moot even though challenged ballots were certified and distributed; *Belitskus v. Pizzingrilli*, 343 F.3d 632, 649 (3d Cir. 2003) (as-applied derivative voter claims not mooted after election had

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[3]Relaxing the "same plaintiff" requirement in election-related cases may be an artifact of the exception's application to election- and pregnancy-related cases. At least three federal Circuit courts have found support for the proposition that the capable of repetition prong of the exception is satisfied when it is reasonably expected that *some* plaintiff will find itself in the same controversy in *Storer*, *Honig v. Doe*, 484 U.S. 305 (1988) (dissenting opinion); *Dunn v. Blumstein*, 405 U.S. 330 (1972); and *Rosario v. Rockefeller*, 410 U.S. 752 (1973). According to the Seventh Circuit,

> while canonical statements of the exception to mootness for cases capable of repetition but evading review require that the dispute giving rise to the case be capable of repetition *by the same plaintiff* . . . the courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in abortion and election cases.

Majors v. Abell, 317 F.3d 719, 723 (7th Cir. 2003); *see also Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661-662 (5th Cir. 2006) ("despite the Supreme Court's reminder that there must be a 'reasonable expectation that the same complaining party would be subject to the same action again,' *Weinstein*, 423 U.S. at 149, the Court does not always focus on whether a particular plaintiff is likely to incur the same injury."); *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005) ("Courts have applied the capable of repetition yet evading review exception to hear challenges to election laws even when the nature of the law made it clear that the plaintiff would not suffer the same harm in the future.").

In any event, as the court in *Majors* concluded, regardless of whether an election law controversy must be capable of repetition with the same plaintiff, a court does not require that a plaintiff explain why it has not found itself in the same circumstances to satisfy the capable of repetition prong of the exception. Just as the court does not conduct a hearing on the fertility or plans of a plaintiff attacking an abortion statute after her pregnancy has terminated to determine whether the controversy is capable of repetition, "in an election case the court will not keep interrogating the plaintiff to assess the likely trajectory of his political career." *Majors*, 317 F.3d at 723.

passed); *Teper v. Miller*, 82 F.3d 989, 992 (11th Cir. 1996) (as-applied challenge to campaign contribution regulations during legislative session not moot when General Assembly adjourned). Surely as-applied challenges addressing the particular idiosyncrasies of ballots or by particular candidates are at least as "fact-specific" as the League's challenge of the application of the electioneering communication prohibition to its broadcast, yet these cases were found to satisfy the exception to mootness.

C. The lower court lists seven specific facts as insufficiently likely to again converge to save the League's claim from mootness and allow adjudication of its merits. In its Jurisdictional Statement, the League pointed out the defects of considering these seven and ignoring other important facts regarding a reasonable expectation that the League will be subject to the same prohibition, and will not repeat them here. *See* JS 14-18. The FEC attempts to rehabilitate the lower court's "perfect storm" analysis by referring to "the thrust of the court's analysis" and ignoring the details of that analysis. FEC Mot. Dismiss or Affirm at 18 n.3, 18-22. The Intervenors argue that a loose subset of four "perfect storm" factors sufficiently demonstrate that the legal question in the League's case is not capable of repetition. Inter's' Mot. to Aff. at 15. In addition to making the standard the court announced less restrictive than it actually is, Intervenors ignore that the three-judge court in *WRTL II* explicitly rejected consideration of three of those same factors in its analysis of whether the mootness exception applied: the context of the Ad's creation, the availability of other means of conveying the desired message, and the circumstances of the campaign. 2006 WL 3746669, at *3; *see also id.* at *4 n.14 (rejecting contextual factors generally). The fourth factor, the content of the Ad, was not even considered by the lower court here in its mootness analysis and instead is relevant to the merits of the League's claims.

D. Questions about the League's role as a plaintiff in future controversies are unwarranted. The FEC and Intervenors are selective in their citations to the record in arguing that the League will not again find itself facing the same legal controversy. It alleged in its Verified Complaint that it "intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition period before the [2006] general election and . . . before future . . . elections in Maine when there are pending matters in the legislative or executive branch that . . . require referencing a clearly identified candidate for federal office," and listed nine other issues of interest that regularly become issues for the legislative and executive branches. VC ¶ 16. In 2004, the League engaged in grassroots lobbying for a previous permutation of the Federal Marriage Amendment ("FMA"). *CCLM*, No.06-0614, Heath Dep. 34:3-35:16 (Doc. # 26-4) (listing methods of communication used in 2004 grassroots lobbying in favor of the FMA). The League mounted a radio campaign in support of the 2004 FMA in July 2004 encouraging people to contact Senators Snowe and Collins and ask them to support traditional marriage. *Id.*, Heath Decl. ¶¶ 6, 8 (Doc. # 26-2); Pl.'s Resp. to Def.'s Req. Prod. 2, 3 and 4 (Doc. # 26-7, 26-8, 26-9, 26-10, 26-11, 26-12). In 2006, the lobbyist for the League participated in multiple conference calls, e-mail exchanges and discussions with legislators, grass roots activists, media, and national level pro-family groups regarding the FMA. *Id.*, Heath Decl. ¶ 9 (Doc. # 26-2). There is ample evidence that the League will again find itself in the same legal controversy as presented by its desire to run the Crossroads Ad.[4]

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[4]Remarks about plans for other broadcasts, Inter's' Mot. Aff. at 16; App. 5a-6a, were responses to questions about *then-current* plans. They cannot be construed to mean that the League never again intends to run grassroots lobbying ads that will collide with electioneering communication prohibition. How could the League accurately respond about future plans when it

E. In an attempt to show that this controversy will not evade full review, the FEC and Intervenors (and the lower court) propose hypothetical schedules allowing review. The court below surmised that

> [a] plaintiff could bring its lawsuit much earlier than did the League. A . . . plaintiff . . . might bring a lawsuit more than a year in advance of an election if it had concrete plans to broadcast within sixty days of the election a specific advertisement, paid for with corporate funds, that mentioned a declared candidate. Such a lawsuit would be ripe and stand a strong chance of gaining full appellate review . . . .

App. 13a. [5] This litigation and that in *WRTL* have proved this to be "unreasonable, if not fanciful." *WRTL II*, 2006 WL 3746669, at *3.

Conclusion

The motions to dismiss or affirm should be denied. Probable jurisdiction should be noted and briefing ordered as requested in the Jurisdictional Statement.

In the alternative, the case should be held for disposition

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could not know at the time of the responses what and when legislative matters touching on its areas of interest will again arise?

[5]Despite the expedition afforded this case, including expedited discovery, fully eight months have passed without a federal court adjudicating the merits of the League's case, let alone reviewing it on appeal. As the three-judge court noted in *WRTL II*, 2006 WL 3746669, at *4, the district court in *McConnell* recognized that legislation giving rise to the need to broadcast grassroots lobbying ads such as the League's, "typically arise[] in the 30- and 60-day periods before a federal primary or general election" (*citing McConnell v. FEC*, 251 F.Supp. 2d at 793 (Leon, J.)). The *WRTL II* court also noted that "as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign." *Id.* at *7.

after this Court decides *WRTL II*, for consideration of issues possibly not dealt with in *WRTL II* (such as the addition of government officials' position on the matter that is the subject of the grassroots lobbying).

Respectfully submitted,

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